SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA BARBARA
SANTA MARIA BRANCH; COOK STREET DIVISION
DEPARTMENT SM-2 HON. RODNEY S. MELVILLE, JUDGE

THE PEOPLE OF THE STATE OF)
CALIFORNIA,)
Plaintiff,)
-vs-) No. 1133603
MICHAEL JOE JACKSON,)
Defendant.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FRIDAY, MARCH 18, 2005

8:30 A.M.

(PAGES 2709 THROUGH 2800)

REPORTED MICHELE MATTSON McNEIL, RPR, CRR, CSR #3304
BY: Official Court Reporter 2709

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Santa Maria, California
Friday, March 18, 2005
8:30 a.m.

(The following proceedings were held in open court outside the presence and hearing of the jury:)

THE COURT: Good morning.
MR. SNEDDON: Good morning.
MR. MESEREAU: Good morning.
THE COURT: All right. The first item on the calendar is the scheduling of a motion for admission of evidence of defendant's alleged prior sexual offenses. This was put on the calendar because the District Attorney has asked that the hearing be sooner than later, I guess.
MR. SNEDDON: That's correct, Your Honor. We placed the motion on, in light of the Court's earlier decision, which we wholeheartedly agreed in, that we should have testimony before the jury establishing the offenses that were committed by the victims themselves -- on the victims themselves prior to the time of the hearing. And we believe that we have complied with what the Court wished. And I think the Court gave a perfect example of your experience of what happened to you before where promises were made and promises weren't kept. 2711

I believe that we have at this point established sufficient information before this Court and before this jury to now go forward with the 1108 hearing. We would indicate to the Court that this would be the appropriate time.

I'm not suggesting that the Court -- we recess the trial at this moment. I want to make that clear. And I think I did in my moving papers. That we intend to move forward with probably evidence through -- my guess is, if not through Thursday, probably into Friday of next week, based on the lineup that we have. We'll finish those parts of the case that are relevant to the allegations set forth against Mr. Jackson in all counts except for Count 1.

At that point, we will then be transitioning into that part of the case that deals with the conspiracy count. It seems to me that it is not only right and proper, but logical for the jury that this would be the appropriate time for us to be able to put on the 1108 evidence insofar as it relates and bears on the testimony of the credibility and the actions of the defendant in this case. And so we would request that at that point in time, that we then take up the 1108 hearings.

So unless the Court has any further questions, that's why we filed the motion now. I wanted to give the Court sufficient heads-up about 2712

it for scheduling for the jury, as well as the fact that we'll need to bring people in from out of county, and out of state in some instances, so we need some lead time for that. And clearly that whatever decision the Court makes, we would have enough lead time for that. If we started next Friday, we could begin, and we'd be ready to begin. And if it was the following Monday -- but you get the picture. It's at the point where we finish most of the testimony relevant to the charges against Mr. Jackson on the molestation.

THE COURT: All right.

MR. SNEDDON: Do you have any other questions, Your Honor.

THE COURT: I do, but I want to hear from the other side first, and then I'll ask my questions.

MR. SNEDDON: All right. Thank you.

MR. SANGER: Good morning.

THE COURT: Good morning.

MR. SANGER: The timing of the motion, we want to have adequate time to have the motion heard and be prepared for it. I don't concede at this point, by any means, that there's been a showing sufficient for the Court to go ahead and make a ruling right now. And if the Court were to make a ruling right now, I think it would be to deny the 1108.

But having said all of that, the People I 2713

1 think are saying that they feel that they're going
2 to be in their strongest position to make their 1108
3 motion by the end of next week, and I don't see any
4 reason why we can't schedule a date to do that.
5 We have two issues: One is whether or not
6 they have presented sufficient credible evidence of
7 the sexual offense crimes. And then the second
8 issue, which would be taken up in the actual motion,
9 would be what kind of evidence would come in, and
10 whether or not the kind of evidence that's proffered
11 is going to be -- is going to have sufficient
12 probative value to outweigh the prejudicial effect
13 and consumption of time, and so on.
14 Having said that, if that's the Court's
15 understanding, I think we're talking about just
16 picking a date now. And I don't see any problem
17 with picking a date -- you know, a week from Monday,
18 for instance, would seem to be a good time.
19 Do you think so.
20 MR. MESEREAU: (Nods head up and down.)
21 MR. SANGER: Thank you.
22 THE COURT: All right. Here's my question
23 to both sides. Mr. Mesereau got me thinking about
24 this from a request that he made earlier.
25 And the issue -- I guess the question is,
26 should the Court hear the evidence outside the
27 presence of the jury, or should I just hear
28 arguments on the evidence, as represented to the 2714

Court that it will be, as to whether or not the 1108 evidence should come in.
And the thing that got me thinking about it was that Mr. Mesereau had suggested that they be allowed to put on testimony to attack, as I understood what he was saying, the credibility of the witnesses that would be called under the 1108, so that the Court could make a determination, I think, based on credibility, as to whether or not the Court would allow the witnesses to be called.
And that was a unique suggestion to me, because I've had a lot of hearings under Evidence Code 401, 402, 403, preliminary fact, and I don't recall that -- I laugh because there's a lot of things I don't recall, but I don't recall ever having that evidence put in at a 402 hearing.
So, having that dilemma and working on it, one of the cases that we found was Vorse v. Sarasy, S-a-r-a-s-y, "Vorse" being V-o-r-s-e, 53 Cal.App.4th 998. It's a 1997 case. And it suggests that the Court is not to make credibility issue determinations. That -- you know, that my taking of evidence may not be proper on either side on this issue. It may be just that I am to decide whether or not it's admissible with an analysis of what you're offering, whether that would, in fact, be 1108, and then make the weighing under 352 for all the reasons that 352 has the Court make those -- 2715

1 weighing those issues.
2 It's interesting that the Vorse case cites
3 another case, People v. Jackson. No relationship.
4 But you can pick that citation out of the Vorse
5 case.
6 So I'm willing to let either of you respond
7 to that at this time.
8 MR. SANGER: I would like to, although Mr.
9 Sneddon's standing at the podium.
10 MR. SNEDDON: It's our motion, that's why.
11 I figured you'd want to. No, after me.
12 MR. SANGER: Oh, after you. Okay. Well, as
13 they say, "After you."
14 THE COURT: After you. After you.
15 MR. SNEDDON: Abbott and Costello. I hope
16 we're not that bad.
17 Judge, I think the simple answer to this is
18 the Evidence Code provides your discretion to do it
19 either way you feel comfortable with it.
20 I think that the issue on the credibility --
21 let me make sure I'm talking about precisely what
22 the Court asked. In terms of whether you wanted to
23 have a 403 hearing outside the presence of the jury
24 that did not involve the issues of credibility -
25 okay. --
26 THE COURT: Right.
27 MR. SNEDDON: -- or whether you wanted to do
28 it on the offers of proof, I believe that the 2716

Evidence Code clearly provides that you have the discretion to do that whichever way you want to do it. So, that's your decision, and....
But with regard to the credibility issue, I believe we cited the Jackson case to you in earlier motions. We were aware of that. And not only in connection with the 1108 hearing, but in connection with some of the other pre-trial hearings that involved witnesses' statements, that we brought that case to the Court's attention. If not that one, certainly there's another one that we did.
So we were certainly aware of the fact that we believe that the credibility issues are those for the ultimate trier of fact, which is the jury.
So I would say to the Court that we are prepared to accommodate the Court in either way in which you would like to do it. Obviously the most efficient would be for you simply -- and with the ability of the defense to file, as you suggested to Mr. Mesereau I think a couple of days ago, their pro-offered -- although I don't know, since you can't weigh the credibility, what effect that could have on you. But in any case, we're prepared to do it either way that the Court wants.
And I frankly think that, given the way that this case is going, that probably the best case is simply to put these people on. And we'll put them on on direct and they put them on on cross and we 2717

keep the trial moving in front of the jury. But, of course, as always, we'll do what the Court suggests. That would be my recommendation.
And I do not believe the credibility issues, as you cited the case, are something that is really an issue in the 403 hearing.
THE COURT: All right. Counsel. Mr. Sanger.
MR. SANGER: Yes, sir.
The case law that I'm familiar with -- and I won't claim to be specifically familiar with the Vorse case without looking it up.
THE COURT: Yes.
MR. SANGER: But just in general, it is true that the Court's ruling on a 402-, 403-type hearing for any kind of a determination, and under 1108 as well, is whether or not - there is a threshold - the threshold has been met. And the threshold doesn't involve the determination of credibility in the sense that the Court is saying, "Well, you know, I just don't really believe these witnesses, so I'm not going to let the jury hear it," and usurping the jury's function, the ultimate function. But there still is a threshold level where credibility is one of the issues that the Court is taking into account, and the Court's taking it into account under 352.
For instance, let's take an example, just a hypothetical example. Let's assume that one of the witnesses, a key witness that's proffered by the 2718

prosecution under 1108, is a witness who is going to say that she saw various things that were circumstantial evidence of some kind of activity, and that's their main witness. Let's just assume this. I don't want to argue about the facts of this case, but let's assume that that's the case. And it turns out that that witness made several prior inconsistent statements on television and eventually in a sworn deposition.

It's not so much a weighing of credibility. It's not usurping the function of the jury to hear that evidence. But I think the Court would want to hear that evidence, because under the three prongs of 352, number one, you're looking to see whether or not the evidence is so inflammatory that it's going to be prejudicial to the defendant such that the probative value is outweighed by the prejudicial effect.

Well, you have to figure out what the probative value is going to be before you can determine whether the prejudicial effect is going to outweigh it.

And so therefore, you have to say, "Well, look, we've got a witness," for instance, "who made a number of prior inconsistent statements on television, for money, and eventually under an oath in a deposition, and now this witness is being offered up." The prejudicial effect of just having 2719

this person come and say things may, in fact, be quite substantial in the Court's mind when it's heard the evidence.
And on the other hand, the probative value the Court would have to find is probably fairly minimal, given the scenario I just gave.
It would also go to the question the Court has to address, the second problem, which is undue consumption of time. Are we going to have a hearing about this witness. And taking one of the witnesses, again, hypothetically, are we going to have a hearing that necessarily involves allowing the defense to fully -- to fully defend it.
As the Court knows, and we've cited cases in our main pleadings on this, that we're entitled, and not only entitled, but we're required, it's ineffective assistance of counsel to fail to do a full of defense of 1108 evidence --
THE COURT: Right.
MR. SANGER: -- as if it were an independent case.
THE COURT: Right.
MR. SANGER: So we're not only entitled to, but we're obligated to. We're going to have to bring in all of those statements on television, for money, and before a deposition.
And I'm saying that in a concise fashion, but Your Honor knows that's going to take time to 2720

bring all that out. So I think the Court has to consider that.

And then the third prong of 352 is confusion to the jury -- or, I'm sorry, is undue consumption of time. I may have gotten those two confused, but thereby illustrating my point, I suppose.

And so to take more time to further illustrate my point, you have confusion of the jury and you have undue consumption of time. And both of those -- without restating the point, both of those are determined only after the Court has a full opportunity to figure out what the heck is going to go on in front of the jury.

All right. So I think all three prongs -- it's not a matter the Court usurps the function of the jury by determining credibility. It's a threshold call, like many things are, and particularly things under 352. The Court has to determine how this is going to play out in front of the jury.

So you're not per se determining credibility, but you are saying, look, the credibility is going to be attacked substantially, let us say, after the Court hears the evidence, and therefore the prejudicial effect is going to be great, but there's a little probative value; therefore, there's an undue consumption of time; and therefore, there's the potential for confusing the

jury.
So I do think that we should be able to present to the Court concisely, but I think with some live testimony, as needed from both sides, the evidence that the jury is going to see. And I think that just submitting it on paper would not adequately address the issue, particularly in a criminal case with the constitutional rights that are involved.
Does that answer the Court's question.
THE COURT: Yes. Thank you.
MR. SNEDDON: Judge, could I address one other aspect of this motion that we haven't discussed.
THE COURT: Yes.
MR. SNEDDON: I will do it just briefly.
But I wanted to remind the Court that as part of this 1101 -- or 1108/1101 motion, that we had filed an earlier motion with regard to the admissibility of the civil settlements, so we had deferred that until this hearing process also. So I wanted to just make sure that the Court did that.
THE COURT: Thank you.
MR. SNEDDON: And I think that's part of this process. And also, you know, the guidelines with regard to what can and won't be asked I think is important. And there will be two separate -- I believe with two witnesses, probably two separate 2722

civil suits involved, and so I wanted to alert you to that also.
THE COURT: Thank you. Those will be set at the same time.
MR. SNEDDON: Yes, sir.
THE COURT: If I don't say it, I intended to have those heard at the same time as this motion.
MR. SNEDDON: I don't know if you wanted me to address anything Mr. Sanger said. If you do, I'll answer the question. Otherwise, I'll just submit it to the Court.
THE COURT: No, you don't need to.
MR. SNEDDON: Thank you.
THE COURT: Without ruling on that, because I'm not quite ready -- I haven't quite made up my mind. But rather than spend the time now thinking about it, let's hear some argument on the other issues.
Let's see, the objection to calling the grand jury witness.
MR. SANGER: Your Honor, we've briefed the matter and so I don't want to go over --
THE COURT: Yes, I read that again this morning.
MR. SANGER: -- each one of the points. But what I did want to do is briefly augment it with reference to the grand jury transcript. And we did cite the transcript in our papers in an 2723

1 effort to keep things short. You know, we didn't
2 quote things at length and make a big deal out of
3 it. We tried to follow the concept that this was a
4 brief and, for a change, make it brief.
5 THE COURT: I appreciate that.
6 MR. SANGER: Okay. But looking at the
7 actual transcripts of the grand jury, our position,
8 as you know, is that if it's not in the transcript,
9 that's too bad. The People are there to make their
10 record and they know how to make a record. And
11 we're not there. There's nobody there to object.
12 If they wanted to have somebody put on gloves and
13 look at things, they could say, "We're putting on
14 gloves," and so on.
15 And, in fact, as the record shows, when you
16 look at the actual transcript of the grand jury, and
17 you look at the testimony of Timothy Sutcliffe, he
18 talks about having gloves on. There's a question as
19 to whether or not he had gloves on, and he had
20 gloves on at one point when he was handling some
21 moldy -- what appeared to be moldy schoolbooks.
22 When it comes to the end of the -- of his
23 testimony, and you look at page 1245 -- and I have a
24 clean copy. I'm sure the Court has the whole
25 transcript, but I have a clean copy, if it would
26 help.
27 THE COURT: They're here. 1245.
28 MR. SANGER: 1245. 2724

1 THE COURT: What volume would that be.
2 MR. SANGER: That's a good question. I'm
3 sorry, Your Honor, I just have the excerpt here.
4 THE COURT: I can find it. That's all
5 right.
6 MR. SANGER: OKAY.
7 THE COURT: Volume 5, I think.
8 1245 did you say.
9 MR. SANGER: Yes, sir, 1245.
10 THE COURT: Yes. Okay.
11 MR. SANGER: Okay. I just realized I didn't
12 turn my cell phone off, so I'm going to do that real
13 quick. It didn't ring, but --
14 THE COURT: I've done that. It's been
15 embarrassing. I've been sitting in court and my
16 cell phone has gone off, and I have to act like,
17 "Whose cell phone is that."
18 MR. SANGER: "Get that cell phone."
19 MR. MESEREAU: Must be Mr. Sneddon, Your
20 Honor.
21 THE COURT: Yeah.
22 MR. SANGER: If you look at 1245, this is
23 sort of our smoking gun conversation here. And I
24 know that the prosecution has some other version of
25 it. But starting at line 14 -- does the Court have
26 that in front of you.
27 THE COURT: Yes, I do.
28 MR. SANGER: Since you have it in front of 2725

you, I'll just paraphrase and quote from the relevant source. But it's a grand juror who asked about the black suitcase, which was Item 317. And it was admitted in evidence here as some other exhibit number, which I don't remember right now, but the black briefcase. And it had all the materials inside. And the picture, you recall, had the magazine on the top that had a date later than the relevant time period.

And Mr. Auchincloss asked a question that the grand juror had proposed and said, "Did some -- a forensic examination of some pornography in this case" -- I'm sorry, "You did some -- a forensic examination of some pornography in this case, correct."

He says, "Correct."

Now the question is, "Did you find any -- did you find any fingerprints on that pornography, usable fingerprints."

Now, that's not a question asked by a District Attorney who knows that there was no fingerprint analysis done. That's a question of a District Attorney who is asking a witness, "Well, did you find any fingerprints, usable fingerprints.

And the answer is, "Well, we're doing all this stuff" - I'm paraphrasing - "We used an ALS," alternate light source. They did a fluorescent check to see if there was any stains, and then they 2726

could do DNA, and they found no stains and no DNA.
So the question is, "So they haven't been
examined for fingerprints."
"A. No, not at this time."
And then they go on to explain the
alternative light source thing.
Now, at the end of the grand jury
proceeding, there is a -- when the jurors are about
to deliberate, there's a part of the transcript
where they show Detective, I believe it was Zelis,
has been instructed to wear gloves, and, "You're not
to deliberate while he's in there, but he's going to
take these things out and show them to you." Okay.
So by the end of the grand jury, clearly
someone's wearing gloves and showing the grand
jurors.
Now, that doesn't -- and I'll represent to
the Court, we have a witness from the clerk's office
who says that after the grand jury returned the
exhibits, they went through without gloves and they
were tabulating and making sure all the pages were
there, and they didn't know there was a problem.
But, aside from that, the most important
thing here is that if you then go back to page
421 -- and I'm guessing that would be in Volume 2.
Okay.
THE COURT: Uh-huh.
MR. SANGER: I'm sorry, I'll get the volume 2727

1 number next time I quote the transcript.
2 But if you go to 421, starting at line 23 --
3 I'm sorry, line 25, you have the questioner, one of
4 the district attorneys saying, "Now, I want you
5 to -- I broke -- we're going to break the seal on
6 this exhibit."
7 And they're talking at this point about the
8 black briefcase.
9 "I'm going to ask you to look very briefly,
10 young man, at the stuff that's in there. All
11 right. Take a look at the stuff.
12 "Now, there's some magazines, correct.
13 "Yes.
14 "Then there's some sheets that are
15 individual and not in magazines as if they've
16 been torn out, correct.
17 "Yes.
18 "Now, can you tell me whether or not that
19 was the kind of materials that was in the
20 suitcase that was shown to you.
21 "A. Yes, that was the kind of materials.
22 "Q. Does that look like some of the stuff
23 that was shown to you.
24 "Yes."
25 And it goes on beyond that.
26 The point is, if -- realistically, if this
27 was a point in the proceedings where somebody was
28 wearing gloves and saying, "Don't touch it, I'm 2728

going to show it to you," that would be on the record.
What's on the record is, "We're breaking the seal. We're opening it. Now, young man, look at this."
And as you saw from the exhibit, the photograph, the way it was seized and the way it was sealed, all these things are stacked up. So the only way to see if there's other magazines and to see if there's separate pages is for somebody to look through them, for a person to look through them. There's no evidence that the District Attorney is looking through them. There's no evidence anybody put on gloves.
And so the clear record on this appears to be that the District Attorney at that time, remembering this occurred on 3-30, and the Sutcliffe occurred on 4-8. In other words, it wasn't until 4-8, it appears, that somebody said, "You mean you didn't even look for fingerprints. We knew you didn't get any usable prints, but you didn't look for them." And then they go in and make a big deal about gloves in the deliberations.
So on 3-30, when they're showing it to Gavin Arvizo, it looks, to me, from the record, pretty clearly that nobody was wearing gloves, and there was no effort to do anything to avoid contaminating this evidence by the fingerprints of Gavin Arvizo. 2729

Okay. So, having said that, that's our position.
Now, does that give the District Attorney the right to call a grand juror. And we take the position, no, because the code says you can only call them with regard to testimony. And as we pointed out, that's pretty much obsolete these days because the recent case law -- I cited Cummiskey, but I believe there's other ones, like Moucharaub also talked about it. The courts have said we're entitled to a full transcript of the testimony, so it should pretty much negate the need to call in a grand juror. There may be other ways to do it. A District Attorney could take the stand and say what he wants to say.
But we have the further problem that we were given the name of the foreperson of the grand jury for the first time two days ago. No address, no phone number.
The prosecutor had a proceeding in which they had full access to these people. They know all their names. We've never been allowed to know their names. There was an objection when we asked to get their names. The Court ordered that numbers be used instead of names. That was done in the transcripts.
They come up and say, "Well, here, we have a name. No statement. Except we're going to tell you this witness is going to come and say we did everything 2730

1 right."
2 Furthermore, there were 18 other grand
3 jurors there. We've never been given their names.
4 We have no ability to interview them. So we have
5 that major problem with calling grand jurors.
6 And do we really think it's appropriate to
7 disclose all the names of all the grand jurors and
8 have them all interviewed with regard to whether
9 there were gloves or not, or whatever, about
10 something in the middle of the process.
11 And that leads me backwards to the first
12 point I made - or the first or second in writing -
13 and I'll conclude with this - is that this whole
14 thing, even if the Court were to say, "Well, okay,
15 we'll even the playing field. We'll give you all
16 the names and addresses and phone numbers. You can
17 have your investigators go talk to all of them, and
18 then you all can call in competing grand jurors,"
19 okay.
20 Even if we did that, and even if that
21 survived a 352 analysis on consumption of time and
22 undue confusion to the jury, the prejudicial effect
23 of bringing in people from a body that made a
24 determination -- a quasi-judicial determination
25 under California law and an administrative
26 determination under U.S. Supreme Court precedent, in
27 other words, part of the prosecution, if that -- if
28 they're allowed to do that, that is going be 2731

extremely prejudicial, because you've got jurors who are trying to hear the case. They're now listening to a juror who has a vested interest in upholding the process that they went through, the best they could as laypeople, to return an Indictment. That kind of evidence to this jury is going to be -- is going to be very prejudicial.

THE COURT: You know, the interesting thing in your argument, though, is that, through excellent cross-examining skills, you, the defense, have put into issue whether or not the children touched the magazines during the grand jury proceeding.

So at this point, the state of the evidence is most favorable to you that the inference is strong that they must have touched those magazines.

Now, having skillfully done that -- and this is not meant to be anything but a compliment.

MR. SANGER: I'm always worried when I get complimented by the Court.

THE COURT: Yeah, I can see you starting to worry. No, I really mean that. Credit where credit's due.

But then you say, having skillfully raised this inference, "The District Attorney should be barred from rebutting that, and that's it." And that's -- that's what I find interesting about your argument, is that.

Now, let me ask you a question. 2732

MR. SANGER: Yes.
THE COURT: You don't have to defend your excellent skills at getting to this position.
MR. SANGER: I do have an answer to that, but --
THE COURT: You have an answer to that. And I would say, if you had been doing the grand jury, I think that that would have been covered, but the transcript would have been 4600 pages instead of 1800, which I found overwhelming.
MR. SANGER: The trial would be shorter.
(Laughter.)
THE COURT: I doubt that. What was I saying. How can I lose it like that.
MR. SANGER: Could I respond a little bit. And I'm sure that will cause the Court to remember.
THE COURT: Yes.
MR. SANGER: I appreciate what the Court said and -- but I think the --
THE COURT: Oh, I know. I know what I was going to say.
MR. SANGER: I knew if I started talking, that would help.
THE COURT: You did it. You helped me. There's a couple of possibilities that I see here. One is that you're only asking -- as well as you did, you know, it's just an inference that they 2733

touched. There is no evidence that they touched.
We don't know if they touched or didn't touch at this point. But the inference is strong by your examination, the defense examination, that they did.
There's a couple of ways we could handle that. One is you could stipulate that they didn't touch it. That would get rid of any prejudice of calling a grand juror, foreperson of the grand jury to -- and any resulting prejudice.
You know, I can see from the look on your face, that's not going to happen.
MR. SANGER: Right.
THE COURT: But -- is that right.
MR. SANGER: That's correct.
THE COURT: You're not willing to stipulate to that.
MR. SANGER: We actually believe he touched it. I honestly believe that, for what it's worth.
THE COURT: That being the case, the question then becomes, you know, what is a fair way, if there are witnesses in -- that saw this.
And one of the things that we could do would be to call that witness, but not identify them as a grand juror or foreperson of the grand jury, but simply say they were in the grand jury room and they observed whatever they observed, so that you don't have the prejudice that you're so much afraid of, you know, this formidable person being called. 2734

What do you think of that.
MR. SANGER: Well, I think there's yet another possibility. So in answer to the Court's question what I think about that, I think this:
Another possibility is there are other people in the grand jury room: The prosecution; I believe there was a police officer there, or a sheriff there most of the time.
Did I just hear somebody say no, there wasn't. I don't want to waste time talking about it if there wasn't a police officer in the room at that time.
But that would be a possibility. Certainly the District Attorney, whoever -- whichever one or two or three were there at the time, could testify. I would assume if they're taking the position that something else happened, we're going to hear that.
The third possibility is to allow us to have the names and addresses of all the grand jurors. It seems clear -- and the reason I say this -- well, there's the obvious reason, but there's a more subtle reason as well.
It seems clear from the transcript of the grand jury that there was -- there were several grand jurors who asked a lot of questions. There was one grand juror, for instance, who was particularly interested in this fingerprint issue.
I don't know who it is, because we only have a 2735

number. The prosecution knows who it is, so we're not on even ground here.
But one way to do this would be to allow us to have the names of the grand jurors so that we can adequately investigate this and see what they all have to say.
In other words, in response to the Court's question, I certainly wouldn't want to stipulate the foreperson can just come up here and not be identified and say, "I was in the room when I saw this," because that's just the problem. The foreperson has -- and I don't mean to fault him or her.
THE COURT: I think you made a very good point; that other people may have seen something the foreperson didn't, or -- you know, it's a good point.
MR. SANGER: But my first position on this, again, is that the government should be, in a way, bound by the transcript, because they're the ones that are making it. That's what the Supreme Court has been saying over the last few years. Last, you know, 25, 30 years, it's been increasingly adamant about the fact that there's -- there's a record before the grand jury. The prosecution is the only side in there. They're the only lawyers in there. They have the obligation to make sure that that transcript is complete so it can be reviewed. 2736

1 And if we're going to have a grand jury
2 process where things can be done in secret, where
3 the defense can't be there, the accused isn't there,
4 there's -- there's not a Judge, if we're going to do
5 this, the only protection is to make sure that the
6 prosecution makes a complete record. So the -- the
7 original position that we're taking -- I'm going
8 full circle on all this.
9 THE COURT: No, I understand.
10 MR. SANGER: -- is that when you look at it,
11 the transcript is the transcript. And the inference
12 from the transcript, as I just read it to the Court,
13 is an inference, and the jury should be allowed to
14 hear this testimony or have this read to them.
15 They can consider that along with what other
16 evidence has been put on to determine whether or not
17 the chain of custody on this material was such that
18 when fingerprint analysis was later done after it
19 was released and they allegedly find a fingerprint
20 of Gavin Arvizo, that the jury can say, "Yeah, we're
21 sure that fingerprint came from February or March of
22 2003."
23 THE COURT: I guess I have -- you have an
24 advantage that I don't have, too. And maybe you can
25 help me. I haven't heard the evidence on the
26 fingerprint on the magazine or more than one
27 magazine. I don't know. You know, I know from
28 points and authorities something, but I don't know 2737

the picture. I don't know if there's a palm print or a --
MR. SANGER: There's a fingerprint.
THE COURT: Just one fingerprint.
MR. SANGER: Well, here's the problem right now. And before we discuss this and go into too much detail, I'm always conscious that whatever we're going to say is just going to be in the press.
THE COURT: You can be circumspect. You don't even have to answer that. I was just going to say that I don't know that information.
MR. SANGER: Let me tell the Court this in general terms, is that we don't know that information either, because there have been reports that were given to us showing that there was a fingerprint. Well, showing that there was, in this context, a fingerprint, one fingerprint that we're concerned about.
THE COURT: Okay.
MR. SANGER: There were others that were determined not to have sufficient data to make -- make a positive identification. There are others where they're absolutely negative. They were excluded. Okay.
THE COURT: All right.
MR. SANGER: What has happened very recently, in the last couple, three weeks, is we've gotten reports that there have been a meeting of 2738

various fingerprint people who have now decided that some of these determinations should be changed. And they go both ways. They go -- they go -- in the sense that they had a fingerprint they positively identified, they're saying, "No, we don't think we can say that." And then they said, "We've found some others that we said were not conclusive and now we think are conclusive." So we're in flux on this.

But the essence of it is that, if this is true, that Gavin Arvizo had a chance to go through these papers so he could see the sheets and he could see the magazines, and he picked them up to do that, if that's true, this would be a very significant piece of evidence with regard -- this inference that we have is very significant with regard to fingerprints that are done later.

And understand, and I'm sure that -- and I don't mean to just offend the government here, but it is --

THE COURT: Do you mean you intend to offend more than just the government.

MR. SANGER: No. Whenever anybody says that, that means we're really going to offend the government.

But -- I really don't want to be rude, but, I mean, the fact is, if you look at any case that you have in the ordinary course of criminal law, 2739

when do you have a situation where something is referred for forensic analysis very shortly -- I don't have the exact dates here, but very shortly after it is seized it's sent over for forensic analysis - it was seized November 18th, and I think it was sent for forensic analysis in November - and they do their analysis. They do an alternate light source.

And we will show from -- we started to get into it, and then the officer wasn't clear on what 317 was. But the officer on the stand wrote a report saying, "Please" -- and these were the words: "Please do a fingerprint analysis." And he sent the material back with the reports saying, "Please do a fingerprint analysis." And it sat there until March and April of 2004.

In March of 2004, now, whatever that is, six months after it was seized, it's opened, it's shown to the grand jury, it's booked into evidence, it's handled by the clerk.

And then sometime in the summer of 2004, it is taken out of the grand jury, and then it's sent for fingerprint analysis.

Now, that isn't the way it should have gone.

And I don't know if anybody's going to argue, "This is the way we do things," but I've never seen it. I mean, if there's going to be fingerprints, you take them before you book it into evidence. 2740

THE COURT: Let's let the District Attorney respond.
MR. SANGER: Okay. Thank you.
MR. ZONEN: After we seized the magazines from Neverland - and there were many, many, many magazines that were seized at that time - there were lengthy discussions about how to handle this, these magazines, and how to process them.
It was exactly the opposite of what Mr. Sanger said, that we were suddenly in the middle of the grand jury hearing and we're embarrassed because somebody thought for the first time to do fingerprinting.
The reality was quite the opposite of that.
The question was, do we proceed with fingerprinting first, or do we proceed with a search for biological evidence.
The problem is, is that the process that you use for either the search for fingerprinting or the search for biological evidence could have the consequence of negating our ability to find the opposite. Whichever you go first with could have the problem of destroying the evidence as to the opposite.
We had a lot of deliberations, a lot of discussions over many weeks, with a number of people, from the Department of Justice as to how to proceed on these issues, and very cautiously 2741

proceeded with each individual magazine and each individual page by initially using alternative light sources that would suggest the presence of biological material, either semen or perspiration or some form of human contact with it that would leave biological evidence behind.
There were some cuttings that were then taken, in an effort to minimize the destruction to the magazines, and as a consequence be able to preserve the possibility of finding fingerprints.
The actual fingerprint process didn't begin until after the grand jury hearings, partly because the evidence was before the grand jury, at least that portion of it. The evidence that was introduced were the magazines only in that one suitcase. It was not as to the balance of the magazines that came through.
There were 19 prints that we were able to identify as belonging to the victims and to -- to Star and to Gavin, and to the defendant. At the moment, I can't tell you over how many magazines. I don't have that information right in front of us.
Counsel was wrong, of course. There are no police officers who are in the grand jury room unless they're giving testimony. The rules are different from a regular court. We're not entitled to have an investigating officer present.
So when counsel asked Detective Zelis, 2742

"Isn't it true you handed those magazines to Gavin Arvizo." the answer is, he wasn't in the room when Gavin Arvizo was on the witness stand. We're not allowed to do that.

The only time that we had an officer in the room with the evidence was at the time that the jurors were allowed to view the actual magazines. And that was Detective Zelis. And he -- he was the one who handled the magazines and showed them to the jurors. They didn't touch them. And he, of course, wore gloves, as was consistent with his testimony.

During the presentation of evidence of the two boys, yes, we did not put on the record that nobody was going to be touching the magazines, although there's plenty of references to the fact that we were maintaining strict control, specifically at the time that the jury viewed the material. You'll see that in the record, that they weren't allowed to touch the magazines at that time.

We have asked the foreperson of the jury to come forward and testify to this, because she was the person sitting closest to the witness. And she was the person responsible for taking control of the proceedings and making sure that the secretary had each of the items and that they were marked appropriately, that the witness is admonished, and of course she was in the best position to be able to see what was going on. 2743

And she is prepared to come in and testify that the children never touched any of those magazines; that they stayed in the suitcase. And of course if you look to other references to other material being handed witnesses throughout the course of the 12 days that we were in session and the 45-plus witnesses who testified, when they were handed an item, we said so. "I'm now handing you exhibit number so and so."

So it's pretty clear that the descriptives that are being used in the presentation of this suitcase is very different from how we presented other evidence where we really did hand it to them and they were able to take it.

But the question is, are we bound by a transcript as to this particular issue. We're not talking about legal matters presented before the grand jury. We're talking about an accusation by the defense that we handed material to a witness, and that that witness then put their fingerprints on it, and that we then presented the fingerprints that we found as having come from Neverland as opposed to from a grand jury.

Now, that's an accusation that was raised first by the defense, and in his opening statement, Mr. Mesereau, and then by Mr. Sanger specifically in his questioning of Detective Zelis.

"You did hand this magazine to Gavin, didn't 2744

you."
And he said, "No."
In fact, he wasn't even in the room when it
was handed. It was not he who presented that
information. It was, in fact, Mr. Sneddon who
showed the material, and it was in the presence of
19 grand jurors, myself, and Mr. Auchincloss.
We believe that it's appropriate for that
witness to testify. And we believe it's appropriate
for that witness to identify herself as the
foreperson, because that is, in fact, the piece of
information that makes her the most observant.
It is her responsibility, above and beyond
the other 18 members of that grand jury, to be
attentive to what's going on and attentive to
protocol and making sure that these exhibits get to
the secretary and get marked properly, and get
stored appropriately as well.
And I think that extra responsibility on her
part, which she took very seriously, which you'll
see if and when she testifies, is the indicia of
credibility that is necessary to be able to resolve
this issue. It's an important issue. And we
need --
THE COURT: What about the request that you
reveal the names of the other grand jurors so that
they can see if any of the other grand jurors saw
something different. 2745

MR. ZONEN: Well, they are percipient witnesses to this event. And if the Court feels that's appropriate, do it. But our position is it's overkill. That's why she is the foreperson of the grand jury. But again, that's for the Court to resolve.
THE COURT: So you think in this courtroom that the Judge is a better witness of what's happening at the witness stand than the jurors.
MR. ZONEN: I think that -- I would always think that the Judge is a better witness than anybody else in the courtroom as to what's happening in the courtroom.
THE COURT: The reason I raise that is that, you know, I'm looking at -- I'm doing all sorts of things. And I see a lot. I hope I see a lot. But I know at times I don't. I mean, I'm distracted by this or that.
MR. ZONEN: Well, it may be appropriate to do an in-camera examination of other jurors, if the Court feels that's appropriate, rather than reveal all of their identities publicly. That certainly is an option as well.
Ultimately, I think it's the Court's call on this matter. But I don't believe that we should be barred from being able to present evidence to contradict an event that they say took place that didn't take place for which we do have witnesses. 2746

1 And we are witnesses, for that matter. It's a
2 suggestion for which they have no basis of belief
3 and have no basis of belief now.
4 THE COURT: Anything else.
5 MR. ZONEN: No. Thank you.
6 MR. SANGER: Your Honor, the -- let's put it
7 this way: It may be a multi-stage process. It
8 seems to me that, for whatever reason, the state of
9 the record is the state of the record because it was
10 handled the way it was handled.
11 We didn't have anything to do with that. We
12 made representations based on our analysis of the
13 grand jury transcript, which we made, I believe,
14 early on as part of the 995, and there's certainly
15 no secret it was made as a part of Mr. Mesereau's
16 opening statement. There's no secret that we had a
17 concern about these items being handled in the grand
18 jury. And I think when Mr. Zonen says there's no
19 good-faith basis, if you read the transcript, I
20 mean, how much more clear could it be.
21 Now, that's that part. And I think we're
22 entitled to go ahead with whatever inference we
23 have.
24 We strongly disagree with the calling of the
25 foreperson of the grand jury. If the Court is
26 thinking about doing that, we would like to have the
27 opportunity to interview the other witnesses. I
28 think that's only fair. 2747

Particularly, but -- not limited to, but particularly the person that asks these questions about fingerprints, because obviously he or she was very concerned.

So I think it's a process that if the Court -- and the Court could say -- or it's a multi-step process. The Court could say, "I agree, they're stuck with the record. Let's move on," and that would take care of it.

The Court could say, "Well, I may let you call Mr. Sneddon to the stand, and we can cross-examine him about it, and we'll move on."

The Court could say, "Well, I'll let you -- we'll consider whether or not you can call a grand juror," which we strongly object to for other reasons, but if the Court were going to go there, then we'd want to have a chance to interview everybody. And then, after we interview everybody, have a chance to come back to the Court before they call a grand juror, because we can see that it's a very prejudicial, very difficult matter.

I mean, you have people -- I'm sure the Court's been aware that when trial jurors, for instance, are interviewed after a verdict, there's a strong inclination on the part of jurors to argue that what they did was fair. And of course they want to be fair. Most people want to believe that they're fair. 2748

THE COURT: I understand that feeling.
MR. SANGER: Yes. Judges as well, I'm sure.
But with jurors who are laypeople, quite often when they're interviewed, you know, will say, "Well, yes" -- the first thing they'll say, "We were very fair. We evaluated the evidence. We followed the Judge's instruction." Of course, like anybody else, they have a vested interest in what they did. And I think there's a real danger of putting somebody up here who's a layperson who will have a vested interest.
So, what I'm saying is, if you get past stage one, stage one, we eliminate -- that's it. The record is the record. The inference is an inference. And we can argue it.
Stage two, a witness such as Mr. Sneddon, if he wants to testify he was there, we'll cross-examine him.
Stage three, if you're considering jurors, let us interview first and determine where we are, because we may say, after that, that it is so prejudicial to put anybody on, that we just -- we want to forego that, forego the calling of a grand juror at all.
But we'd like to at least have an opportunity to talk to the others, if the Court's going to get to that level.
Does that make sense. 2749

THE COURT: Yeah, I understand your argument, your approach.
MR. SANGER: Okay. Thank you, Your Honor.
THE COURT: I don't think that the law is at the state that the record is the only evidence of what happened at the grand jury proceeding. I mean, I could picture a situation where the -- somebody challenged the reporter's transcript of what was said and the Court had to have a hearing as to the accuracy of the transcript. And the Court would have to take testimony from people in the grand jury room of what was said.
That doesn't happen very often, but it's -- in my career it happened at least once, that -- you know, and it turned out that the Court ruled that the transcript was not accurate on that point.
So you can't say that the transcript is the only way that anyone can ever determine what happens in a courtroom or a grand jury room.
The next thing that the Court considers is the -- it's certainly not fair to allow the District Attorney to choose one grand juror, albeit, the foreperson, and have that person be the only one that testifies.
I don't think that the Court should be involved in investigating the case. In some countries, that's what happens. The Judge investigates the case, brings the Indictment, and -- 2750

not here. That's not what we do here. I don't investigate. So the only time we have in-camera hearings is when there's issues of privacy or privilege at stake that have to be predetermined before, to determine whether or not they outweigh the other interests.

So I'm not interested in myself conducting an in-camera hearing trying to examine witnesses. Not only that, you know, I think that that would be your job.

The only thing that I can really see as a fair situation here would be to order that the names of the grand jurors be given to the defense, and with a protective order that they cannot reveal the grand jurors' names to anyone other than their investigator, who would be bound by the same protective order, and that they be allowed to question those -- or to approach them.

I mean, it's up to the jurors whether they talk to them or not. It's -- it's not ordering people to talk to them, but they need to have that opportunity.

It seems also that I would -- well, I don't think I should make -- I have some other orders that I might make, but I think -- I probably shouldn't make those until we find out where we are after that point.

MR. SANGER: I understand. Could I -- with 2751

regard to the protective order, we were given the name of the foreperson by the prosecution two days ago. We weren't given an address, but we did locate the foreperson.
And my understanding is that the foreperson said, "I've" -- "I've talked to the District Attorney, and I'm not going to talk to you," in essence. I don't -- that's not a quote, but that's --
THE COURT: They didn't want to talk to you.
MR. SANGER: They didn't want to talk to us. And they made it clear that they had talked to the District Attorney. So there seems to be some allegiance there, which one can understand for someone being in the room with the District Attorney for however long that was.
THE COURT: You think that causes allegiance.
MR. SANGER: It could cause allegiance or could cause irritation.
THE COURT: But that's the problem that you have with all witnesses. It depends on how things go.
MR. SANGER: I think more so here, simply because -- because you do have this -- you know, there -- as we outlined in the grand jury, we had Lieutenant Klapakis apparently marshaling grand jurors around, and he was a witness. And you had the district attorneys in there. And there was a 2752

lot of camaraderie, and -- you know, that happens.
Anyway -- and they came to a conclusion, and
they're in the international spotlight for having
come to that conclusion, I suppose.
I would just ask in the protective order
that -- that perhaps it could be phrased in a way,
and perhaps we could submit a proposed order to the
Court, a written order, that would allow us -- that
would indicate that the Court is specifically
authorizing our representative to talk to them about
this particular subject matter, the handling of
evidence, something general so we don't prejudice
the viewpoint. And that they're not -- they're not
obligated to talk to anybody, but the Court would
appreciate their cooperation with both sides.
And we would like to have an opportunity
to -- I don't know how many grand jurors have been
interviewed by the prosecution so far. We haven't
gotten reports. And I think that we'd be entitled
to them, quite frankly.
But if they haven't interviewed grand
jurors, to at least give us the first shot at this
point so we have a fair chance to really find out
what happened. We just want to know what happened.
So I'd request those additions to the
protective order. And then depending on what
happens, we can come back and address the Court as
to what should happen with regard to actually 2753

calling witnesses.
THE COURT: Do you want to respond to that.
And you can also respond to what I was saying, if you want.
MR. ZONEN: Our response is that -- our preference is that each of the grand jurors be interviewed in the presence of both sides at the same time to avoid needless inconvenience to them and needless intrusion into their time; that there certainly be a protective order that keeps their identity secret and not public; and that there be a restriction on the extent of the examination of the witnesses, and limited only to the issue of whether or not these boys touched the magazines, and not any other issue that may have come up in the 12 days of grand jury testimony.
THE COURT: Yeah, I definitely would put that restriction on. I don't want the grand jurors examined on any issue other than this issue.
MR. SANGER: Could we though -- could we, say, limit it to, say, handling of evidence. I just worry about telegraphing this particular issue. It's probably going to be telegraphed in the press anyway. But we really should have an opportunity to just talk in general about handling of evidence, and obviously this is the focus of it.
THE COURT: Well, I think we could, as long as you understand - and you understand - that while 2754

1 the statement is rather broad, that the mission is
2 limited.
3 MR. SANGER: Yes, sir. Believe me, we have
4 enough to do. We're not looking for wild goose
5 chases here. We're trying to focus on this issue,
6 so --
7 MR. ZONEN: You're still looking at me. Is
8 there something you wish me to add or answer.
9 THE COURT: No, I'm just trying to think.
10 It's a difficult problem.
11 MR. ZONEN: It is.
12 THE COURT: I was reflecting, actually, on a
13 statement I made yesterday, I think, that we just
14 had a couple of simple things to look at. I took it
15 back right away, but what was I thinking.
16 Let me -- let me -- I want to sit down with
17 my research team and see if we can ourselves
18 structure an order that will be appropriate as
19 opposed to asking for one from either of you. So
20 I'll -- let me do that.
21 MR. SANGER: Thank you, Your Honor.
22 THE COURT: Then the next item -- is it
23 break time yet.
24 The next item --
25 MR. SANGER: No, Your Honor, you have three
26 minutes.
27 THE COURT: I'll use it, too.
28 Motions to quash subpoena duces tecum on the 2755

financial issues.
This is -- this is what I'm going to do here, is I'm going to deny the motion to quash.
Did you have something you wanted to say.
MR. SANGER: I suppose, but Your Honor's already indicated you're going to deny it. I don't want to argue it if that's the ruling.
THE COURT: We've been through this and through this, you know. So what I thought I would do is to deny the motion to quash, limit the period of time. The subpoenas are too broad. We need to address some limitations on the subpoenas. And indicate that I'm not making any ruling on the admissibility of the records at trial, and I'm not releasing them for their experts to examine. This is not a part of the discovery process. This is a subpoena duces tecum for trial. And -- but I think they should have the records here to the extent that they might be used in trial. It's like a lot of other records that have been subpoenaed. They are not necessarily admissible records. That would depend on how they come, what the issue is at the time they're asked to be introduced, and what the records are. But anyway, that's my proposed order on that.
MR. AUCHINCLOSS: May I just make one inquiry, Your Honor. 2756

THE COURT: Yeah.
MR. AUCHINCLOSS: Some of these records will be voluminous. And I'm happy to try and narrow the scope of the request, but there's no way around getting to the issue of the examiner having to see the exhibit and look at it.
THE COURT: See, that's the whole problem here, is that this is not a subpoena for your expert to prepare himself to testify. That is not what a subpoena duces tecum is, and that's not what I'm allowing.
MR. AUCHINCLOSS: So I guess I'm asking the Court, what are you proposing in terms of how -- when the expert can look at the documents and --
THE COURT: Absent a stipulation from the other side, you would open the documents here in open court.
MR. AUCHINCLOSS: It will -- it will obviously be time-consuming.
THE COURT: Well, it may not be, because you'll have to tell me why you want to open them. And they won't be opened so you can spend hours thumbing through them and looking at them. And --
MR. AUCHINCLOSS: If I -- may I have permission to file some authority for the opening of the documents prior to their examination on the stand.
THE COURT: Yes. 2757

MR. AUCHINCLOSS: All right. Thank you.
MR. SANGER: And --
THE COURT: The point is, that the -- you have subpoenaed the records for trial. That's legitimate to subpoena the financial records, because I've already ruled that the -- that under your theory, his general financial statement -- "his," Mr. Jackson's, general financial statement, can be raised as a motive, as you requested. I agree with you, that that's appropriate. And I've ruled that.
I have ruled - if it's not clear, I'll make it clear now - that under 352, I am -- I do not -- I find that the amount of time that would be involved in proving and disproving his true financial worth outweighs the probative value of doing that. And under 352, I'm not going to allow a detail-by-detail examination of Mr. Jackson's finances.
MR. AUCHINCLOSS: And I do appreciate that, and that's why I submitted Exhibit A with our papers. And that really is the substance of the testimony we're seeking to adduce. One page.
THE COURT: Just so you see maybe what -- both sides see what I'm thinking is, the reason the subpoenas are valid is that his finances are at issue in this general sense.
Let's suppose you have somebody testify -- 2758

I think somebody already has said that his finances were at issue; that that was part of the public relations effort that should be taken care of, because people were saying that he had bad finance -- his finances were not in good shape.
But let's say a little further, you had someone testify that, in fact, their belief, you know, based on something legitimate, but not much, that he didn't have good financial standing at the moment, poor cash flow or whatever they say. Then, now, that's all I allow.
See, then let's say that the defense calls their accountant, and then he says, "Well, they're absolutely wrong," you know. "He's worth eight times as much as anyone thought before, and here it is."
Now you've got the records in court, and you say, "Oh, let me look at the records."
Now we have a situation where perhaps looking at the records would be appropriate to cross-examine this accountant.
MR. AUCHINCLOSS: All right.
THE COURT: So the other way, it doesn't quite work for me, that you call your expert and say, "You think he's in bad financial shape."
And he says "Yes," and he says, "Let me show you all his records," and see if that substantiates what you're saying. We sit here for four days while 2759

he goes through them.
No, that's not going to happen.
MR. AUCHINCLOSS: I understand. Your Honor.
Thank you.
THE COURT: All right. Let's take our break.
(Recess taken.)
MR. SANGER: Your Honor, I have one, and
just one, it's a technical question, because -- and
I'm not arguing with the Court.
THE COURT: You wouldn't do that.
MR. SANGER: Not that I -- I'm just not.
But a technical request.
I'm hearing what the Court has ordered is
that the general financial -- I think you said the
general financial statement of the defendant can be
gone into, or status.
THE COURT: No, a statement of general
finances.
MR. SANGER: That's the Court's ruling on
that issue.
THE COURT: Yes.
MR. SANGER: I'm not sure that we had that
on the record. That's why -- I think we may have
discussed that. It may have been on the record, but
I just want to make sure on the record we have
whatever the Court's ruling is.
THE COURT: I think that was the ruling, and
I reiterated it just before the break. 2760

Were you writing down what I was saying.
THE REPORTER: Yes, sir.
THE COURT: It was on the record.
MR. SANGER: Okay. That's fine. Thank you.
MR. ZONEN: Might I be heard on one matter,
as well, before -- let me offer one alternative
solution to another problem.
THE COURT: All right.
MR. ZONEN: With regard to the issues of the
grand jurors being individually interviewed by all
of us, both sides, I assume there's 19 grand jurors,
but there was a court reporter who was present as
well, and presumably she's a witness to that as
well.
We would accept the defense's suggestion to
the alternative resolution, based on your call
entirely. This would be your choice entirely. But
we would offer as an alternative, if the Court's
willing to do so, and we'll accept it, that one of
the three prosecutors present would be made
available as a witness in this case in lieu of the
grand jury.
This is done for purposes of protecting
their identity, as we had represented to them we
would during the course of those grand jury
presentations, and the concern that the Court has
about keeping this matter moving. We're talking
about 20 potential witnesses. 2761

So we would offer that as an alternative, if that's acceptable to the defense, and if that's acceptable to the Court. And the Court would make the determination as to whether you prefer to do it that way or prefer to proceed by way of interview of each of the 19 grand jurors, and the court reporter as well.

MR. SANGER: May I have just a second.

(Off-the-record discussion held at counsel table.)

MR. SANGER: Okay. I think that -- I understand that the District Attorney is saying they would pick one of the people. I don't know that all three of them were in the room at all times, but they would pick one of the three of them to testify. We've already heard what they're going to testify to.

I think that under the circumstances, particularly in light of the fact that there's that one grand juror that's asking questions about fingerprints, I just have a feeling it would be appropriate for us to interview the rest of the grand jurors and find out what everybody says happened. And we can still decide, when it's all done. We may end up with a stipulation with the prosecution once we've had a chance to investigate. But I think it's gone -- the ball's rolled too far in that regard. 2762

If the record is -- and I'm not arguing with the Court on that. The record is the record. But if we can go behind it, then we should be allowed to talk to the other people in the room.
THE COURT: Well, I would -- you know, I would consider -- this is a difficult problem. It's not an easy problem. And the grand jury, when they come to serve, you know, expect their identities to be protected and not to be exposed to cross-examination. That's not something that's anticipated.
If the prosecution is withdrawing their request to call the grand jury foreperson and intends to try to prove their -- the way that -- that the records were not touched by the child during the proceedings, then the Court would accept that withdrawal of the request to call the grand jury foreperson. I don't see any particular problem.
Who would be the District Attorney testifying.
MR. ZONEN: Your Honor, it would probably be Mr. Auchincloss. There were three of us present at the time that the boys testified initially. They were recalled at the end of the proceeding. Mr. Sneddon at the time was involved in a separate trial in Santa Barbara. He was trying the Harms case at the time. He was not present during 2763

the second time.
But we would -- it would be Mr. Auchincloss who would be testifying. He certainly witnessed all the events.
MR. SANGER: And so we'll have Mr. Auchincloss's statement and his criminal history records and all that so we can evaluate him as a witness.
I'm saying that to be funny. I'm sure he doesn't have a criminal history. But we do want to have a statement of the witness, if they call him as a witness.
MR. AUCHINCLOSS: Is that a sound bite.
MR. SANGER: It was a kind sound bite.
But as far as the statement is concerned, the witnesses -- we're allowed to have -- we are supposed to have the information about the witness and their statement, and that's --
THE COURT: That's true.
MR. SANGER: That's part of discovery. So I'm asking for proper witness discovery, which, you know, would include all those things.
THE COURT: That's fine. That's what he's asking for.
But I just want to make clear that I'm not bargaining with you. If he wants to call the other two district attorneys that were present, that wasn't -- I'm not bargaining with you. You know, 2764

you are offering one for one. That wasn't what I was suggesting. I was saying if you want to withdraw the calling of the grand jury foreperson and submit yourself, or that you may, and if he wanted to, you know, talk to the other District Attorney that was present, you know, it's the same problem, isn't it.

But I do think that the correct -- you know, I do appreciate and think the right choice is to not call the foreperson and involve the grand jury in this hearing. So I appreciate that.

So that being the case, I'll vacate the order that I was either going to make or did make about interviewing all the grand jurors, and that won't come into effect unless you -- unless we get back to calling a grand juror.

All right.

MR. SANGER: Could I ask, just -- since the District Attorney actually raised it, the court reporter is under certain statutory obligations of confidentiality as are the grand jurors.

Could the court reporter be relieved from those obligations, to the extent that we could inquire of her of the circumstances in which she recalls the evidence was handled. I mean, we know who she was. Her name is on the -- I won't repeat it, but her name is on the transcripts.

THE COURT: Yeah. 2765

MR. SANGER: And I don't see why that would be a problem.
THE COURT: Let me consider that.
MR. SANGER: Okay.
THE COURT: I'll need to look at what restrictions they have. You don't think they actually watch what's going on, do you.
MR. SANGER: There's a possibility.
THE COURT: Okay. Let me look at that. Do you know what code sections. I'll have to find them. What protections they have.
MR. SANGER: I did cite code sections. I just closed it. But I did cite the code section, the general area that talks about grand jury. It's 9-something. Let me just see if I can find it here real quickly.
924.1 is the grand jurors, and it's right around that same area.
THE COURT: It talks about the court reporter.
MR. SANGER: Yeah. Somewhere in that same series of code sections.
THE COURT: Okay. Thank you. I'll let you -- I'll look at that this weekend and tell you Monday, and --
MR. SANGER: Okay. Would the Court like me to get the exact code section and send it, or --
THE COURT: I think we can find it. 2766

MR. SANGER: I'm sure.
THE COURT: If it's in this area, don't worry.
MR. SANGER: Yes. Thank you.
THE COURT: If you find it's some other area, some other code or something, I'd appreciate if you'd just --
MR. SANGER: Yes, sir.
THE COURT: -- phone Carrie or something. Nothing formal.
MR. SANGER: Yes, sir, I will.
THE COURT: Let the other side know. Then we have -- the next item is the defendant's motion re admissibility of evidence related to George Lopez.
MR. SANGER: Again, we briefed it. I guess the main point that I want to make orally here before the Court is that in a criminal case, the defendant has the constitutional right to confront and cross-examine. And generally, if you have a good-faith belief that something is true, you're entitled to ask questions on cross-examination to test the recollection and test the credibility of a witness. And I think that the Court's pre-trial rulings on this were based on information the Court had at the time. But I think it's very clear at this point 2767

that we have a good-faith belief that Gavin Arvizo was involved in this wallet incident with Lopez, with George Lopez. And the prosecution has already raised -- in their own testimony on direct, they raised the issue that there was a falling out with George Lopez.

I think that just stepping back from the fact that this is the Michael Jackson case and that it's George Lopez, who is an actor, ordinarily, fine, we'd be able to say, "We'll just find out what it was about and get to the bottom of it."

And we understand the Court's ruling. We've all tried to abide by it. But it seems to me that at this point there's more than enough evidence to suggest that we should be allowed to vigorously cross-examine and find out.

As you know, from what we have from the various interviews, there is -- there is clearly some incident that involved David Arvizo and George Lopez that apparently involve the wallet and the accusation that the $300 was taken out of Gavin's wallet. So it's Gavin's wallet that Gavin claimed he left there and claimed he had $300 in it, which is -- David claimed he had $300 in it, which is inherently strange to start with.

Secondly, we have information from Louise Palanker that it was Gavin who was brought into it reluctantly by his father to say how much money was

in the wallet, and he didn't say, "No, there was no money in the wallet," he said, "Oh, I can't remember, I can't remember," based on her version of things.

That is enough of a good-faith belief that there's something going on here with Gavin specifically that is part of the same pattern that occurs throughout, and we've shown that there's parallel patterns. Once there's a falling-out, there's an accusation, and the accusations often escalate.

What we have at the moment -- you know, as defense lawyers, we have to defend. What we have at the moment is we have the prosecution putting the witness on the stand and saying, "Well, was there a falling out with George Lopez." "Yes, there was," and we can't go into it.

So I think we have a good-faith basis, and they've brought the subject up. Even if they didn't, I think we could go into it, but they certainly brought the subject up. We should be allowed to freely cross-examine and really test the recollection and the credibility of the witnesses in what is a particularly critical area and an area that even the prosecution felt was warranted to bring up to this jury.

MR. SNEDDON: Judge, let me -- if I could go back and put this in perspective as to the way I 2769

1 recall this issue coming up.
2 I recall being part of a discussion with the
3 Court and counsel and the attorney for Mr. Lopez,
4 and I recall that the motion was to quash the
5 subpoena. And as I recall it, the decision that was
6 made ultimately, at the completion of the day, was
7 that the Court indicated that you would not release
8 Mr. Lopez from the subpoena, but that you asked the
9 lawyers specifically to file information to you with
10 regard to the incident involving the wallet, so you
11 would be in a better position to evaluate whether
12 Mr. Lopez would be a witness or whether it would
13 qualify for some motion under 403.
14 To my -- to my knowledge only - I can only
15 speak for myself - I've never seen anything filed by
16 the lawyer in response to the Court's request as to
17 what I understood was going to be the next step.
18 And let me tell you, from our perspective, how we
19 feel about it.
20 Our recollection, and from a review of the
21 transcript of the defense's opening statement, Mr.
22 Mesereau said that it was Janet Arvizo, not David
23 Arvizo, who was involved in this wallet incident.
24 And the purpose for us asking questions of
25 people who knew about the incident was to show that
26 it was, in fact, David Arvizo and not Janet Arvizo,
27 because the defense had made a representation to
28 this jury that it was Janet Arvizo who was involved 2770

in that incident, and she was not, to the best of our knowledge.
So with regard to the good-faith belief, now the defense says it was David, but that wasn't what they said, I believe the transcript will bear out, in the opening statement. And it was for that reason that we asked the questions of the witness that was on the stand.
Putting aside the change in position by the defense, we believe further that the information is that the father, David, tried to induce the child to claim that there was $300 in a wallet, and the child refused to do so and was reluctant to do so.
So, I guess our position is, we would like the Court's order that Mr. Lopez be a witness in this case to stay in effect pending the fact that the lawyer file some kind of declaration or pro-offer proof to the Court, and then at that point either side could make whatever motions that they feel is appropriate in light of the information provided to the Court.
We would not want him released. And it could be very well that we want him to testify, because it was, in fact, David, and not Janet Arvizo, who was involved in this incident, and the son, the victim in this case, was not -- was not buying what the father was trying to get him to do.
So that, in essence, is our position on 2771

this, Your Honor.
MR. SANGER: May I respond briefly.
THE COURT: Just a moment.
Here's the question I have: I can't tell
from the declaration of Mr. Sanger, or from the
attached reports, if Gavin, when he called Mr. and
Mrs. Lopez seeking the return of his wallet, claimed
at that time that there was several hundred dollars
in the wallet. I can't tell if that's your
proffered --
MR. SANGER: Here's -- the state of that
situation is this, as I understand it: Louise
Palanker says that she was advised of this wallet
incident because it was a big topic of discussion --
THE COURT: But can you answer my question.
MR. SANGER: Yes. And when she was told
about the incident - which is double hearsay, or
hearsay at the very least - when she was told, she
was told that Gavin made the call, and that later,
when David Arvizo tried to get him to stand there in
the office and say there was $300, he said, "Well, I
can't remember how much was in there."
THE COURT: Right.
MR. SANGER: Okay. Jamie Masada could not
remember the incident until he was prompted, and
then he remembered it. Then he couldn't remember
all of it. So he went through several stages, but
through the course of his statement, he eventually 2772

says, “Well, I don’t really remember” -- as I recall, he says, “I don’t really remember what Gavin did.”
So we have -- we don’t have a clear understanding, or a witness who is going to clearly say they heard what he said. Hence --
THE COURT: To the Lopezes when he called them.
MR. SANGER: That’s right. Other than Mr. Lopez, Mr. and Mrs. Lopez.
THE COURT: So the statement under your declaration on line 21, 20 and 21 -- are you there.
MR. SANGER: Yes.
THE COURT: “Gavin later called Mr. and Mrs. Lopez seeking return of his wallet. He claimed that it contained several hundred dollars.”
MR. SANGER: That’s my understanding of Louise Palanker’s claim. That’s why we detailed it to show the Court. I mean --
THE COURT: So we don’t know that.
MR. SANGER: We don’t know that for sure, but we’ve got enough. And as I say, there’s a distinction here. And I think I answered the Court’s question.
Okay. There’s a distinction here between what Mr. Sneddon is proposing and what we’re talking about at the moment, I think.
Mr. Blancarte, who’s representing Mr. Lopez, 2773

did say he would file a supplemental declaration addressing the wallet issue.
THE COURT: Well, here's what I recall. And since I'm in the best position to --
MR. SANGER: Yes, evidently.
THE COURT: What I recall is that I overruled the objection to the subpoena and said that Mr. Lopez had to attend. And we agreed we wouldn't call him until April because of his business schedule. The attorney for Mr. Lopez then indicated he was going to file a motion to quash the subpoena, which is different than the objection that he filed. And I told him that if he was going to file a motion to quash the subpoena, I would require a detailed statement from Mr. Lopez as to this wallet incident so I would know what he did or did not have to offer the jury in the way of evidence on the issue.
He has not filed a motion to quash the subpoena, so the subpoena is still in effect. And he's under no duty to file any declaration absent -- only if he files a motion to quash, and that would be in an accompanying declaration.
MR. SANGER: That's absolutely correct, from my point of view, proving that the Court is a very percipient witness on a --
THE COURT: Okay.
MR. SANGER: Now, I was -- in fact, was just 2774

shortcutting that, because I didn't want to go through a long explanation, but the Court very concisely did say what happened.
The point of the story is precisely what I was getting at. Whether or not Mr. Lopez is called as a witness is not Mr. Sneddon's issue right now or my issue right now. The issue right now is whether or not we can confront and cross-examine the witnesses with this incident.
THE COURT: I agree.
MR. SANGER: And I think --
THE COURT: And I think you can.
MR. SANGER: Okay. Thank you.
THE COURT: The difference we have is -- and there's been some -- maybe some misunderstanding from the District Attorney, judging from their objections, that on the 403 hearings, when I said that certain things couldn't be proved, I also said that that did not bar cross-examination of certain witnesses on those items, you know. It's -- and that's -- that's what was going on on some of the ones earlier this week where you seemed to be surprised that I was overruling your objection to cross-examination on some of those issues.
So I agree with you, that cross-examination of witnesses that have knowledge of this would not be inappropriate. You know, there's limits on that, of course. 2775

MR. SANGER: Well, I understand. The Court makes rulings as you go along, obviously. Okay. Thank you. I believe that resolves that issue.
We did have one more matter that we had. It's not on the agenda.
THE COURT: Yes, we'll take that up now. A motion for a mistrial.
MR. SANGER: That's right. And just --
THE COURT: Let me just -- let me rule on the first motion first, because it's connected, in a way.
MR. SANGER: Okay.
THE COURT: And you connected it.
What I'm going to rule on the motion for admission of evidence on the alleged prior sexual offenses under Evidence Code Section 1108 is that we will hear argument on the -- on Monday, the -- what date would that be. Would that be the 28th.
THE CLERK: Yes.
THE COURT: On Monday the 28th.
The way I think I would like to do this is to have -- not to call witnesses unless I get to the point where I want to have a witness.
So I'll have the prosecution make their arguments as to why they believe particular witnesses should be called as to particular items, what they're going to say. And I'll allow the 2776

1 defense to say -- they can do this in advance. I
2 would encourage some written material if you have
3 time to do it, but not requiring it, as to why -- in
4 a particular case, what you would be doing and why
5 you think it would -- should be excluded under 352,
6 and let you argue those things, and then I may or
7 may not ask for a witness in any particular
8 situation. It will depend on how I hear what you
9 have to say, what my opinion is then.
10 MR. SANGER: And if you were going to
11 request a witness, would it be on a different day,
12 or should we have people lined up outside the
13 courtroom.
14 THE COURT: Well, let's make it a different
15 day so that we don't have to inconvenience all sorts
16 of people.
17 MR. SANGER: Okay.
18 THE COURT: But I'm pretty much of the
19 opinion now, having read the cases on this, that the
20 likelihood of having any witnesses is not great.
21 MR. ZONEN: It's not what.
22 MR. SNEDDON: Not great.
23 THE COURT: Now, on your motion for a
24 mistrial.
25 MR. SANGER: Yes, sir.
26 First of all, a motion for mistrial is
27 generally made orally. And it was made orally in
28 this case, just so the record's clear, by Mr. 2777

Mesereau when he said, “I have a motion.”
THE COURT: He did. I understood what he was saying. And I asked him to wait, and he did. And the record was made timely, if that was an issue at all.
MR. SANGER: I just wanted to -- we have to connect the dots on the record, you know, so I just wanted to make sure we did that.
THE COURT: Yeah. That is your right.
MR. SANGER: Thank you.
And I understand that we’re not supposed to say the word “mistrial” in front of the jury, and therefore we don’t.
THE COURT: That’s correct.
MR. SANGER: We filed a memorandum of points and authorities in support of the motion for mistrial this morning, hand-delivered it to the District Attorney.
A mistrial, though, is generally -- a motion for mistrial is generally made orally, and I intend to make this orally. The points and authorities just support what we said. And I’d incorporate the points and authorities in my oral presentation so that I don’t have to repeat everything.
Having said that, the basis for the motion for mistrial is that the Court made a ruling, whether the Court intends -- or, I shouldn’t say 2778

1 "intends," whether history bears out later that the
2 Court either grants or denies the 1108 motion, the
3 prosecution was under a clear duty not to go into
4 '93, '94 matters.
5 And what they did, what Mr. Auchincloss did
6 specifically, was not only ask a question that -- to
7 which a witness responded out of the blue, "Oh," and
8 named names. And I'll just avoid saying the names
9 right now, but it's already in the record, and
10 everybody will see it, I'm sure. But, you know,
11 that can happen. You tell your witness there are
12 certain rules, and the witness gets up on the stand
13 and they're nervous, and all of a sudden you ask a
14 question, and they blurt out things that they're not
15 supposed to say.
16 That's not what happened here. What
17 happened here was that the witness came up with one
18 name, which was Macaulay Culkin, and Mr.
19 Auchincloss, not being satisfied with that, went
20 back directly to the very list of names that he has
21 in his 1108 motion, that he's been asking the Court
22 to be allowed to go into, and the Court said, "No,
23 not until we rule on it." And he asked leading
24 questions. "What about so and so." And then they
25 said, "Yes." "What about the next person." She
26 said, "Yes."
27 It's in the record and I've cited it. I
28 just don't want to repeat it unless the Court wants 2779

me to.
THE COURT: No, based on your written
material, I read that record this morning.
MR. SANGER: And when you compare that to
the 1108 motion, there's nothing accidental about
this.
Now, the issue or the problem that I see
here is that, number one, the Court's order has been
blatantly disregarded. I'm not saying that from the
standpoint of being punitive. I'm just saying, as a
practical matter, that's exactly what happened. It
couldn't have been any more blatant and it couldn't
have been any more intentional. It was clearly done
with leading questions. So as I said, there's
nothing accidental about this. And it goes right
down the list of the people that the prosecution
wants to talk about.
If you look -- if you compare the 1108
motion to the transcript, it's exactly what he's
doing. He's getting in the information that the
Court had said don't get into until we have a chance
to do it.
So I think that the only remedy at this
point is a mistrial.
Now, the prosecution could argue, "Well, you
should grant our 1108 motion anyway, so there will
be no harm, no foul," which means they can then put
the Court in this difficult position, deliberately 2780

violate the Court's order, and then get the benefit of all worlds on this.
That can't be right. There's got to be a sanction. And the only appropriate sanction, reluctantly - I say this reluctantly - is a motion for a mistrial. And I say it reluctantly because I think that when you look at the cases such as Oregon vs. Kennedy, the United States Supreme Court case that we cited, and the People vs. Batts, which is a California case, the case law says that if a mistrial is granted based on prosecutorial misconduct, and it's granted not at the request of the defense, then jeopardy may have attached and the case is over.
On the other hand, we're in that position where we have that choice. Do we stand here and just say, "Well, we're going to take it, because if we request a mistrial and the Court grants it, they can just start all over again and prosecute again."
After considering this, we've decided that our -- the only thing we can do, as a practical matter, is ask for a mistrial as the first remedy. If that's denied, there may be other remedies. But I think we have to -- in good conscience, given what happened, and the blatant nature of the violation, I think we have to request a mistrial.
Now, the prosecution can come back and say, "Oh, well," you know, "what's a little violation of 2781

the court order here. I mean, we've spent a lot of time and money, the Court's spent a lot of time and money, look at all these sheriffs are here helping us get to our cars and do things, and the press."
That can't -- that can't be a reason to overlook something that in any other case would be just an absolutely intolerable violation of a court order.
He went down with leading questions, went down the list of people that the Court has already indicated you can't get into until we -- until we have a hearing on it.
So what do we do. As my former colleague in this case used to say, "We have to do something more than nothing." And I think that that's -- that's precisely what we have to do in this case. And I think the only proper remedy is to grant a mistrial.
None of us, believe me, wants to sit here and start this case over again. But what -- you can't unring the bell. They've gotten into specific names and specific allegations that they were told not to get into, and here we are.
Now, if the Court decides for some reason that a mistrial should not be granted, then we've suggested another possible sanction. But only if the Court denies that motion for a mistrial.
We've also indicated that we believe, and I'm saying it up front and I've said it in the 2782

papers, that this -- even though we have requested a mistrial, this still may come within the exception under the Kennedy vs. Oregon or the People vs. Batts cases, in that this appears to be such deliberate misconduct, where the very names are read in leading questions that are in the motion, that it -- it would be viewed as a case in which jeopardy is attached and mistrial is deliberately caused, and there may not be a retrial.

But whether that's the case or not, those consequences are not for the Court to weigh at this point. The Court has to weigh whether or not there was just a blatant disregard of the Court's order, and if, based on that violation, a mistrial should be granted.

And we respectfully submit that that is the proper remedy. And then, as I say, if the Court disagrees and doesn't grant a mistrial, then we've suggested, among other things, as a sanction, the 1108 motion should just be summarily denied, the People's motion on that, because that would -- that would at least be a sanction to deal with this.

The Court could then issue an admonition that these -- that, "The reference to people prior to the 2003 time period will be stricken. You're not to regard them," and we could go from there.

Thank you, Your Honor.

THE COURT: Counsel. 2783

MR. SNEDDON: My first comment is that Mr. Sanger points out one of the anomalies of the law that we face when we try criminal cases, and that is when there's an allegation that someone on the prosecution side steps over the boundary, all of a sudden the defense can get up and make mistrials and characterize it in a certain fashion.

But on the other hand, when we sit here and watch defense counsel continuously step over the boundaries and get admonished as violating the Court's 403 rules, the prosecution's basically at the mercy of the Court, because the law does not allow us to make any kind of motion to rein in or bring under control somebody who just consistently violates the Court's orders.

Having said that, two wrongs never make a right, so I'd like to address the correctness of why we believe that this motion should be denied, there should be no sanctions, and why the Court should ignore this, in the sense that it was not deliberate and not intentional.

First of all, the Court's 1108 motion dealt with specific allegations of misconduct on the part of the defendant involving other young boys. There was no attempt to elicit that information from these witnesses. There was no intent to infer that there was any improper conduct on the part of Mr. Jackson with the individuals. The questions were directed 2784

totally at the witness with regard to who were people who came to the ranch and visited Mr. Jackson on certain occasions.

And frankly, given the Court's ruling on staying away from the 1108 areas of misconduct, I can't see how, frankly, it comes within the purview of just simply asking whether these were individuals who came to the ranch during a particular point in time involving the period of time in which this person was an employee at the ranch.

In fact, the Court sustained some objections, but most of the objections you sustained were on the basis of foundation. And it was at that point when Mr. Auchincloss went back and went through them serially, individually, you did not overrule -- in fact, you overruled objections on the part of the defense as to some of those questions.

Now, I think it's pretty hard to stretch that kind of questions and those kind of answers in the kind of context that they were presented as being prosecutorial, deliberate misconduct on the part of somebody, when it was clear that there was nothing inferred with regard to the conduct of these people at the time, and the conduct of the defendant in relationship to these people.

And so I just submit to the Court that, given the whole series of questions and answers and the sustaining of objections, that there was nothing 2785

really improper that happened in the first place;
that this is part of the give and take at trial.
And some of the boundaries, I think the Court would
probably -- you won't take judicial notice of it,
but the Court has tried to guide us generally
through some of these landmines in this case, and
it's not altogether sometimes clear just how far one
can go and one can't go. And I think that's been a
problem on both sides of this case.
But to say that something is deliberate and
something rises to the magnitude of some kind of a
mistrial declaration in this particular case, I
think is a very, very big stretch in light of what
happened in the total context of this trial and in
the total context of the examination of this
witness, Your Honor.
THE COURT: Any rebuttal.
MR. SANGER: Yes. First of all, I'd feel a
lot more comfortable, rather than bringing up other
things and then saying two rights don't make a
wrong, if we just address the issue. And also, I'd
feel a lot more comfortable if the prosecution
indicated that they were wrong.
However, what's happened here is we're
saying there was no intent to infer. And as we
cited in our papers on page two, and including the
footnote on page two, that it was Mr. Auchincloss,
not Miss Fournier, who said things like "special 2786

1 relationship" and "special friends." It was Mr.
2 Auchincloss who was trying to make this relevant to
3 his 1108 motion. It was Mr. Auchincloss who brought
4 out the ages of the children. It was Mr.
5 Auchincloss who asked questions only about boys and
6 not about girls.
7 He chose to do that, why. Not because it
8 was a random discussion of Miss Fournier and what
9 she'd been doing on the ranch for 10 or 12 years.
10 This is directed specifically to the inference. And
11 Mr. Sneddon just got up and said there was no
12 intention of bringing out. You know, I'm just taken
13 aback by that. Of course there was an intention to
14 infer something by this testimony. I can't believe
15 we're in the same courtroom.
16 And if you look at that, when Mr.
17 Auchincloss goes on about special relationships,
18 special friend, ages, boys, he's clearly tying it in
19 to his 1108 argument. And if he wasn't doing that,
20 the relevance objections would have been sustained,
21 I'm sure.
22 It was -- it was offered as relevant
23 evidence. It wasn't offered for some background of
24 Miss Fournier. And the Court ruled earlier that
25 that evidence would not be admissible until the
26 Court had a hearing on it.
27 So, you know, it clearly was improper, and
28 it clearly was for a purpose. I just can't believe 2787

I heard to the contrary.
The question is, you know, what does the Court do about it. And in saying that somebody on the defense team overstepped boundaries from time to time makes this right, it just doesn't. And the defendant does have a constitutional right to a fair trial and to have the Court -- the Court's orders followed by the prosecution.
This is a bell that cannot be unrung. And I just think under the circumstances, there's no choice but to grant a mistrial. As, you know, remarkable as that might seem to the public or somebody else, the fact is, as lawyers and as a Judge, we all know that there are legal rules. These legal rules, in this case that the prosecution follow the court orders, were not followed, and the consequence of those breaches of legal rules is that the Court has to declare a mistrial, and I believe that that's the appropriate remedy.
Thank you, Your Honor.
MR. SNEDDON: Judge, I promise it will be less than a minute, but I wrote something down that I didn't tell you that I think is relevant to this issue.
THE COURT: No, we have --
MR. SNEDDON: All right.
THE COURT: We have opening, response and 2788

reply.
Well, let me tell you how I was looking at it when I was making the rulings, which is there was some evidence by the District Attorney where -- from which he would like to prove or have the jury infer that when children go to Michael Jackson's ranch, that they are unsupervised, they become wild and crazy kids, you know. There was a lot of -- the inference they wanted to be drawn, I think, was that that is a situation that Mr. Jackson wanted; that he didn't supervise them; he wanted them to become uncontrolled children.
Then Mr. Mesereau, in cross-examination, spent a good deal of time trying to establish -- that's not a good word, "trying." I should say working to establishing that, in fact, many truckloads, busloads -- not "truckloads," busloads of children, carloads of children, appeared at the ranch when he was there, and -- when Michael Jackson was there, and when Michael Jackson wasn't there.
And there was an ongoing entertainment of children, and that -- excuse me, that the children acted as children do when they're taken to any amusement park. And that, in fact, Mr. Jackson wasn't there a lot, and wasn't out watching them a lot and really didn't have much contact at all with all of these children who took advantage of the rides and zoo and everything. 2789

1 And then the District Attorney came back
2 and, in my acceptance of that evidence at that time,
3 was to try to reestablish or to establish the
4 contact that Mr. Jackson did have with the children.
5 And that, in fact, there were certain children that
6 he had a great deal of contact with, and that this
7 was the balancing of the evidence that I was
8 watching from this position.
9 And so when the District Attorney asked if
10 there weren't certain children that he had
11 established good, strong relationships with - and
12 she confirmed, the witness confirmed that that was a
13 fact, and started naming them - I didn't feel that
14 that violated the 1108 order. I didn't see -- from
15 my standpoint, I didn't see that it was either
16 harmful or helpful to either the defense or the
17 prosecution.
18 I mean, some of the children that were named
19 were relatives of Mr. Jackson. And I did
20 specifically limit that testimony to that area
21 purposefully. And I thought the District Attorney
22 recognized it when he said he intended to go no
23 further than that, and I said I would hold him to
24 it.
25 And then when the -- when he did mention
26 Jordie Chandler, he said -- he was the one that
27 raised it, not the witness.
28 "How about Jordie Chandler." 2790

1 And she said, “Yes.”
2 And Mr. Mesereau said, “Your Honor, I’m
3 going to object based on the Court’s ruling on
4 1108.
5 “The Court: Sustained.
6 And Mr. Mesereau said, “Move to strike.”
7 And the Court struck the testimony.
8 And it was after that, of course, that Mr.
9 Mesereau moved for a mistrial. But I felt that that
10 cured the situation.
11 And one has to keep in mind that this isn’t
12 the first that the jury’s heard that name. And even
13 one of the questionnaires for service of jury was to
14 ask the jurors what they knew about the alleged
15 1993 -- or the 1993 alleged incident. And it’s come
16 up -- 1993 has been mentioned by other witnesses.
17 So it’s not like this is the first, nor will it
18 probably be the last time, it’s mentioned.
19 So I’ll deny the motion for a mistrial and
20 any request for sanctions.
21 Let’s see. Is there anything else before
22 me.
23 MR. SNEDDON: Judge, may I ask a question
24 about the procedure on the 28th, in terms of what
25 the expectations are, us moving forward with our
26 case. And then I have one minor thing that I’d like
27 to discuss.
28 THE COURT: Yes. 2791

MR. SANGER: Before you change the subject, though, could I just ask one clarification question on that ruling.
THE COURT: Yes.
MR. SANGER: Just so we don't have a problem -- I mean, the Court is going to rule however it's going to rule.
THE COURT: The Court ruled however it did rule.
MR. SANGER: That's true. I'm speaking about prospectively on other -- if this comes up again. It would be our position that mentioning the names of children who are in the 1108 motion, whether they're there because -- well, for whatever reason, mentioning those names from '93, '94, or prior to that should not occur, it would be our position, unless counsel approaches and asks for permission. Because I still believe that that comes within the 1108.
I understand what Your Honor said. I'm not arguing with the ruling. But prospectively, until the Court rules on the 1108, that would be my belief and understanding. And I'd ask if we could follow that procedure; that if there is an intention to do something like that, that we have an opportunity to be heard on it.
THE COURT: I think that's only fair. There could be other situations where that testimony is 2792

admissible before we get to 1108. It's not admissible under 1108 or -- so it would have to be some limited purpose. But to prevent the need for further hearings like this, I think you should advise them if you're going to go through that list --

MR. SNEDDON: Okay.

THE COURT: -- before then.

MR. SANGER: Thank you, Your Honor.

MR. SNEDDON: Judge, on the 28th, when you said we were going to have argument, should we anticipate that that will take the day, and we shouldn't be required to have witnesses standing by. I don't even mean in connection with the 1108. I mean just --

THE COURT: Yeah.

MR. SNEDDON: -- to carry on that day. Do you envision that would take the whole day or part of the morning. I just want to get direction so --

THE COURT: Well, how long do you think your argument will take.

MR. SNEDDON: Depends on whether it's -- who's arguing it. But -- and depends on how much leeway the Court gives.

THE COURT: How much --

MR. SNEDDON: Based on our experience, I would expect it would probably take a couple of

hours, I guess.
THE COURT: I think at least.
What do you think. Who's arguing that here.
MR. SANGER: I believe I am, Your Honor.
I would say it's liable to take a couple
hours. We could intend to take an hour, but we'll
probably take a couple by the time we're through
THE COURT: So are we talking two hours.
Are you each saying two hours total, or are you
saying two hours --
MR. SNEDDON: I would --
THE COURT: -- each.
MR. SNEDDON: No, I would anticipate that I
would be able to address the Court's concerns in my
opening remarks. And since it's our motion, we
carry the pail on this one, that probably I could do
that in a half hour easily, because you already have
our declarations.
THE COURT: I already have your written
declarations.
MR. SNEDDON: So I'll just highlight things
and we'll go from there. So I would expect that
mine -- my opening would take less than a half hour.
MR. SANGER: And by the time I get through
going back and forth, I think total, the whole thing
will probably take a couple hours. And we'll
probably have a break, so --
THE COURT: So if we had the jury come in on 2794

Monday at 11:30 and did the 11:30 to 2:30, that would work.
MR. SANGER: I think that would be fine. If the Court needed more time, we could do the jury and take more time on another day.
MR. SNEDDON: So 11:30.
THE COURT: So we'll -- we're going to argue -- the arguments will start at 8:30.
MR. SNEDDON: Yes, sir.
THE COURT: But you'll need to have witnesses commencing at 11:30.
MR. SNEDDON: Is it the Court's intention to rule that day.
THE COURT: Unless -- yes, unless I need to call a witness.
MR. SNEDDON: Okay. So if the Court rules in our favor on one or more witnesses, we could go ahead and put them on right away, then.
THE COURT: Yes.
MR. SNEDDON: All right.
The second thing is kind of a personal thing, and it involves the Court also. You indicated we would not be in session Tuesday afternoon, and the reason is the dedication at the Juvenile Hall. And I know they're dedicating it to Sue Gionfriddo, who is a close personal friend of mine, and we've been colleagues for over 30 years together, and I was very close to her and her 2795

deceased husband.
I had intended to attend that service, but then you invited all the jury, and I'm a little squeally about going over there, because I don't want to run into a juror, and I don't want to get accused of any improper conduct. So I guess what I'm asking the Court is --
THE COURT: I would expect you to attend, and I don't expect any of the jurors to attend. Did you notice the laughter when I --
MR. SNEDDON: I know, Judge. But I just want to make sure that I've addressed -- I've consulted with you about that.
THE COURT: I'll address that with them Monday and tell them I really don't expect them to attend. I think they're in tune with my humor.
MR. SNEDDON: I don't want to get accused of showing up if you said they were going to be there, or something like that.
THE COURT: No, I understand. I think everybody -- Mr. Sanger might even want to be there.
MR. SANGER: I was going to say, Sue Gionfriddo has been a good friend of mine for a long time, too, and I intend to attend. And I assume if we saw a juror, we would go in a different direction.
THE COURT: Yes. I'd require them to wear their badges if they went. I don't think they're 2796

going to go. They're really looking forward to the break.
MR. SNEDDON: Last thing: Do we have an update on the computer. We're in the middle of trial here. We'd like to get some of that information.
Are we done with at least one of the computers with regard to the --
THE COURT: I'll have to defer to Jed.
MR. BEEBE: The last word I heard was that the -- that there was -- that the disk, based on the new list, was in the mail yesterday. And so as soon as the special master makes a ruling, that material will be available.
MR. SNEDDON: It's -- can I ask a clarifying question.
My understanding was that the Brad Miller computer was completed and that the scoping down of the inquiries was on the Evvy Tavasci computers. Am I mistaken about that.
MR. BEEBE: It's the other way around.
MR. SNEDDON: The other way around.
MR. BEEBE: Yes.
MR. SNEDDON: Oh, but -- the Evvy Tavasci is completed, but Brad Miller's is the one that we're re-evaluating.
MR. BEEBE: Yes.
MR. SNEDDON: I'm sorry, Your Honor, I was 2797

trying to get to the point.
THE COURT: Go ahead and address him. He knows. Go ahead.
MR. SNEDDON: Is it -- have the Evvy Tavasci materials been given to the special master.
MR. BEEBE: Yes.
MR. SNEDDON: And then the next process is it goes to the Judge. Judge Melville will make a ruling from there.
MR. BEEBE: Yes.
MR. SNEDDON: I'm just trying to get an update, Judge.
THE COURT: I agree.
MR. SNEDDON: We're in the middle of trial and --
THE COURT: It's just something that I'm as -- didn't know any more than you did. So we both now know where it is.
MR. SNEDDON: Perfect. Thank you very much. Thank you for your indulgence.
THE COURT: All right. Is there anything else.
MR. SANGER: I don't think so, Your Honor. Thank you.
THE COURT: All right. Court's in recess. Have a good weekend.
MR. AUCHINCLOSS: Thank you, Your Honor.
MR. ZONEN: You too. 2798

MR. MESEREAU: Have a good weekend, Your Honor.

(The proceedings adjourned at 11:05 a.m.)

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REPORTER'S CERTIFICATE

THE PEOPLE OF THE STATE)
OF CALIFORNIA,)
Plaintiff,)
-vs-) No. 1133603
MICHAEL JOE JACKSON,)
Defendant.)

I, MICHELE MATTSON McNEIL, RPR, CRR, CSR #3304, Official Court Reporter, do hereby certify:

That the foregoing pages 2711 through 2799 contain a true and correct transcript of the proceedings had in the within and above-entitled matter as by me taken down in shorthand writing at said proceedings on March 18, 2005, and thereafter reduced to typewriting by computer-aided transcription under my direction.

DATED: Santa Maria, California, March 18, 2005.

MICHELE MATTSON McNEIL, RPR, CRR, CSR #3304